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this Memorandum Decision shall not be
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establishing the defense of res judicata,
collateral estoppel, or the law of the
case.

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**IN THE
COURT OF APPEALS OF INDIANA**

CHARLIE HERBST,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 54A05-0605-PC-276

APPEAL FROM THE MONTGOMERY CIRCUIT COURT
The Honorable Thomas K. Milligan, Judge
Cause No. 54C01-9402-CF-15

April 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Charlie Herbst appeals from the denial of his petition for post-conviction relief.

We affirm

Issue

Herbst raises one issue, which we restate as whether the post-conviction court abused its discretion when it denied Herbst's petition for post-conviction relief.

Facts

On September 30, 1994, following Herbst's guilty plea to Class B felony robbery, the trial court accepted a plea agreement between Herbst and the State calling for a maximum sentence of six years executed and four years suspended. On that same day, the trial court sentenced Herbst to six years of incarceration and four years on direct commitment to the West Central Regional Community Corrections Program. Herbst did not file a direct appeal to that order. On April 23, 1997, Herbst filed his first petition for post-conviction relief alleging an erroneous sentence in that the four years direct commitment should have been sentenced as probation pursuant to the plea agreement. On May 4, 1998, Herbst filed an amended petition for post-conviction relief claiming that the court violated the plea agreement because the four years of direct commitment was tantamount to executed time. On September 17, 1998, Herbst filed a motion for clarification of the trial court's sentencing statement and abstract of judgment, asking the court to clarify the meaning of "to be served as a direct commitment." Appellant's App. p. 31(b). On September 30, 1998, the trial court issued an order clarifying the sentencing statement and abstract of judgment stating that the "direct commitment as used in the

court's Sentencing Order means a probationary period to be supervised by the West Central Regional Community Corrections program," and that "it should be clear that it was the court's intention that successful completion of the Community Correction's program is the term of probation affecting the defendant's suspended sentence." Appellant's App. pp. 31(b)-32. Herbst apparently never received a copy of the trial court's clarification order because he was released from incarceration on the same day. On October 6, 1998, Herbst's supervision was transferred to Tippecanoe County Community Corrections. Herbst never actually reported to Tippecanoe County Community Corrections, and was not seen or heard from by his state-appointed counsel or Tippecanoe County Community Corrections until December 16, 1999.

On December 16, 1999, Herbst was arrested in Benton County on unrelated charges. On June 19, 2000, the trial court found that Herbst had violated the terms of his suspended sentence by reason of the commission of additional crimes. The court revoked his suspended sentence and ordered Herbst to serve the suspended four years of his ten-year term of imprisonment. The four-year revocation sentence was to run consecutive to the sentence on the new charges. Nearly six years later, on January 19, 2006, Herbst filed another petition for post-conviction relief alleging that the revocation of his suspended sentence was invalid due to the trial court's error in ordering four years of direct commitment in the original sentencing.

On March 17, 2006, the post-conviction court denied Herbst's petition for post-conviction relief. Herbst now appeals the denial of that petition.

Analysis

Herbst contends that the post-conviction court abused its discretion in denying his petition for post-conviction relief. The purpose of a petition for post-conviction relief is to raise issues unknown or unavailable to a defendant at the time of the original trial and appeal. Reed v. State, 856 N.E.2d 1189, 1194 (Ind. 2006). A post-conviction petition is not a substitute for an appeal, and post-conviction proceedings do not afford a petitioner a “super-appeal.” Id. The petitioner in a post-conviction hearing bears the burden of establishing the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); see also Davidson v. State, 763 N.E.2d 441, 443 (Ind. 2002). Our post-conviction rules contemplate a narrow remedy for subsequent collateral challenges to convictions. Davidson, 763 N.E.2d at 443. If an issue was known and available but not raised on direct appeal, it is waived. Reed, 856 N.E.2d at 1194. We will reverse the denial of post-conviction relief only if the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. Davidson, 763 N.E.2d at 443.

Herbst contends that the post-conviction court erred in denying his petition for post-conviction relief. Herbst argues that the trial court’s decision to revoke his suspended sentence should be considered invalid due to the error in the trial court’s original sentencing. Herbst, however, did not challenge the revocation on direct appeal and does not claim or establish that the issue was unknown or unavailable at that time. Accordingly, Herbst may not raise the issue now, for the first time, in a petition for post-

conviction relief nearly six years after the revocation was ordered. Further, the issue was waived when Herbst failed to perfect a direct appeal from the revocation.¹

Conclusion

The post-conviction court did not improperly deny Herbst's petition for post-conviction relief. We affirm.

Affirmed.

NAJAM, J., and RILEY, J., concur.

¹ Herbst's only available remedy may be to file a petition for permission to file a belated notice of appeal under Ind. Post-Conviction Rule 2. We specifically make no judgment as to whether Herbst would be successful in that endeavor.